IN THE HIGH COURT OF JUDICATURE,

ANDHRA PRADESH
AT HYDERABAD

(Special Original Jurisdiction)

FRIDAY, THE EIGHTH DAY OF APRIL
TWO THOUSAND AND FIVE

PRESENT

THE HON'BLE MR JUSTICE J.CHELAMESWAR

and
THE HON'BLE MR JUSTICE GHULAM MOHAMMED

WRIT PETITION NO : 7721 of 2005

Between:

M/s. The Oriental Insurance Company Limited, Rep. by its Senior Branch Manager, G.K. Towers, Dwarakanagar, Visakhapatnam - 16.

..... PETITIONER

AND

1. M/s. Graphix and Graphix, a Sole Proprietary Concern of Sri Y. Anil Kumar Dat, S/o. Late Y. Satyanarayana, Aged 43 years, Hindu, Dr.No. 43-19-29, T.S.N. Colony, Visakhapatnam-16.

2. The District Judge Court, Visakhapatnam.

.....RESPONDENTS

Petition under Article 226 of the constitution of India praying that in the circumstances stated in the Affidavit filed herein the High Court may be pleased to issue an order, Writ or direction more particularly one in the nature of Writ of Certiorari by calling that all the records relating to OP.No. 145/98 on the file of the District Judge, Visakhapatnam and set-aside the order dt. 11-07-2003 in OP NO. 145/98 as illegal, arbitrary and against to the rules in force and to the settled principles of law and quash or set-aside the same and to pass such other order or orders as this Hon'ble Court may deem fit and proper in the circumstances of the case and in the interest of justice.

Counsel for the Petitioner: MR.A.KRISHNAM RAJU.

Counsel for the Respondent No.1: N.A.

Counsel for the Respondent No.2: SMT.M.BHASKARA LAKSHMI (SC FOR APHC).

The Court at the state of admission made the following :

THE HON'BLE SRI JUSTI CE J.CHELAMESWAR

AND

THE HON'BLE SRI JUSTICE GHULAM MOHAMMED

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WRIT PETITION NO.7721 OF 2005

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ORAL ORDER:

(Per the Hon'ble Sri Justice J.Chelameswar)

This writ petition is filed with the prayer as follows:

> "For the reasons stated in the accompanying affidavit, it is hereby prayed that this Hon'ble Court may be pleased to issue an order, Writ or direction more particularly one in the nature of Writ of certiorari by calling that all the records relating to O.P.No.145/98 on the file of the District Judge, Visakhapatnam and set-aside the order dt.11.07.2003 in OP No.145/98 as illegal, arbitrary and against to the rules in force and to the settled principles of law and quash or set-aside the same and to pass such other order or orders as this Hon'ble Court may deem fit and proper in the circumstances of the case and in the interest of Justice."

There was an insurance agreement between the petitioner being Insurance Company and the respondents. The agreement contained an arbitration clause and the relevant portion of the same is as follows:

> " **7.** If any difference shall arise as to the quantum to be paid under this Policy (liability being otherwise admitted) such difference shall independently of all other questions be referred to the decision of an arbitrator, to be appointed in writing by the parties in difference, or if they cannot agree upon a single arbitrator to the decision of two disinterested persons as arbitrators of whom one shall be appointed in writing by each of the parties within two calendar

> months after having been required so to do in writing by the other party in accordance with the provisions of the Arbitration Act 1940, as amended from time to time and for the time being in force. In case either party shall refuse or fail to appoint arbitrator within two calendar months after receipt of notice in writing requiring an appointment, the other party shall be at liberty to appoint sole arbitrator, and in case of disagreement between the arbitrators, the difference shall be referred to the decision of an umpire who shall have been appointed by them in writing before entering on the reference and who shall sit with the arbitrators and preside at their meeting."

Eventually, some disputes arose between the parties to the agreement, the details of which are not necessary for the present purpose.

The 1st respondent filed O.P.No.145 of 1998 on the file of the District Judge, Visakhapatnam, invoking Section 11(5) of the Arbitration and Conciliation Act, 1996 (herein after referred as 'the Act'), seeking appointment of arbitrator. By the order impugned in the present writ petition dated 11-07-2003, the learned District Judge was pleased to appoint a former Judge of this Court to be an arbitrator between the parties.

The impugned order is challenged in the writ petition on the ground that the learned District Judge lacks jurisdiction to appoint an arbitrator.

Basically the jurisdiction flows from Section 11 (5) of the Act, the learned District Judge is the nominee of the Chief Justice, contemplated under Section 11 (5) for appointing arbitrator, for all those disputes, where the subject matter is less then Rs.5:00 lakhs. But, the learned counsel for the petitioner, however, submitted that exercise of the jurisdiction is subject to certain conditions precedent. One of those being, where the parties in the arbitration agreement, agreed upon certain procedure by which the arbitrator is to be chosen and the party other than the one who approached the Court, did not comply with the obligations imposed under the arbitration agreement insofar as appointment of an arbitrator is concerned, then only upon recording the satisfaction of the fact that there was a failure on the part of the party other than the one who approached the Court, to discharge the obligation imposed on him under the arbitration contract, the learned District Judge, would get the necessary jurisdiction to appoint an Arbitrator.

The learned counsel for the petitioner laid emphasis on the language of Section 11

sub-section 6 of the Act, which is to the following effect:

"……

(6) Where, under an appointment procedure agreed upon by the parties,-

a. a party fails to act as required under that procedure; or

……"

We accept the submission made by the learned counsel for the petitioner as a proposition of law, but we are afraid that the writ petition will have to be dismissed on the ground that such a plea was not raised before the learned District Judge.

As can be seen from the arbitration agreement that an arbitrator is required to be appointed in writing by the parties in difference. In such a case the procedure contemplated under the Act is stipulated under Section 11 sub-section 4, which stipulates that where the appointment procedure agreed upon by the parties and a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party, the appointment is required to made by a nominee of the Chief Justice.

The learned counsel for the petitioner submitted that as per the arbitration agreement, the 1st respondent did have a legal right to appoint an arbitrator of his choice after a lapse of two months from the date of the service of a notice in writing issued by the respondent calling upon the petitioner herein to appoint an arbitrator. Admittedly, in the instant case, such a notice was issued by the 1st respondent calling upon the petitioner to appoint an arbitrator, but the petitioner did not respond to the said notice. Therefore, according to the arbitration agreement, the 1st respondent had an absolute right to appoint an arbitrator of his choice. The learned counsel, therefore, submitted that the respondent instead of exercising the right of appointing an arbitrator, rushed to the Court seeking appointment of an arbitrator.

Irrespective of the fact that whether there is any violation of the procedure adapted by the 1st respondent herein, we are of the opinion that the impugned order cannot be interfered with by this Court in exercise of its jurisdiction, for the reason that the plea such as the one referred earlier, was not taken before the learned District Judge. Apart from that, even according to the writ petitioner, the respondent

has an unqualified right to choose an arbitrator, having regard to the admitted facts and the terms of the arbitration agreement. If the respondent instead of exercising such right, sought the appointment of an arbitrator by the nominee of the Chief Justice, such a decision, in our view, will not in any way prejudicially affect any of the petitioner's right either in law or in fact. The grievance of the petitioner is based on hyper technicalities. We see no merit in such an objection.

We, therefore, dismiss the writ petition at the threshold since the same is merit less, but in the circumstances, there shall be no order as to costs.

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J.Chelameswar, J

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Ghulam Mohammed, J

mrk

8th April 2005.

To

1. The District Judge, Visakhapatnam District Court Complex, Visakhapatnam.
2. Two CCs to the Standing Counsel for the A.P.H.C., High Court Buildings, Hyderabad.
3. Two CD copies.

*Form-NIC-OGS/WP{**SPJS**}*